BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Marshall Johnson	Commissioner
Ken Nickolai	Commissioner
Phyllis A. Reha	Commissioner
Gregory Scott	Commissioner

In the Matter of Wireless Local Termination Tariff Applicable to Commercial Mobile Radio Service Providers that Do Not Have Interconnection Agreements with CenturyTel of Minnesota

ISSUE DATE: November 18, 2003

DOCKET NO. P-551/M-03-811

ORDER REQUIRING REVISED FILING

PROCEDURAL HISTORY

On May 29, 2003, CenturyTel of Minnesota (CenturyTel) filed a tariff that would, among other things, charge commercial mobile radio service providers ("CMRS providers" or "wireless carriers") $0.02447 per minute to terminate a call to a CenturyTel landline customer that originated within the Minneapolis "Major Trading Area" (MTA).[1] But the tariff would not apply to carriers that had a Commission-approved interconnection agreement or termination agreement with CenturyTel that contained contrary terms.

On July 17, 2003, the Commission received comments from CenturyTel and collectively from AT&T Wireless Services, Inc.; Midwest Wireless Communications, L.L.C.; NPCR, Inc., doing business as Nextel Partners; Rural Cellular Corp.; T-Mobile USA, Inc.; and WWC Holding Co., Inc., doing business as Western Wireless (collectively, the Wireless Consortium).

On August 13, 2003, the CenturyTel, the Wireless Consortium, and the Minnesota Department of Commerce (the Department) filed comments.

The Commission met on September 25, 2003 to consider this matter.

[1] For purposes of issuing licences for a kind of cellular phone service called Personal Communications Service (PCS), the Federal Communications Corporation (FCC) has divided the country into 51 MTAs. See generally 47 C.F.R. § 24.202(a). The Minneapolis MTA encompasses nearly all of Minnesota and North Dakota, as well as parts of Iowa, South Dakota and Wisconsin.

FINDINGS AND CONCLUSIONS

I. BACKGROUND

Since the 1980s, local service providers have charged a fee to transmit and complete calls originating on other carriers' networks.[2] These fees are set forth in the providers' tariffs.[3]

More recently, Congress has sought to open the local telecommunications market to competition by adopting the Telecommunication Act of 1996 (1996 Act).[4] The 1996 Act imposes different obligations on different categories of telecommunications carriers. For example, the 1996 Act requires all telecommunications carriers to interconnect their networks to permit the customers of one carrier to call the customers of another carrier.[5] The 1996 Act and its accompanying regulations impose certain additional duties on incumbent local exchange carriers (ILECs), including the duty to –

- permit competitive carriers to interconnect with their networks on just, reasonable and nondiscriminatory terms,[6]
- establish reciprocal compensation arrangements for the use of one carrier's network to transmit and complete calls from another carrier's customers,[7]
- negotiate in good faith the terms of this interconnection and reciprocal compensation,[8] including submitting to binding arbitration where necessary,[9] and

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[2] This compensation scheme arose when American Telephone and Telegraph Company's local exchange service operations were divested from its long-distance operations. See FCC Common Carrier Docket 78-72 Third Report and Order, 93 F.C.C.2d 241 (rel. March 11, 1983), on recon. FCC83-356 (rel.. September 21, 1983); *In the Matter of a Summary Investigation Into IntraLATA Toll Access Compensation for Local Exchange Carriers Providing Telephone Service Within the State of Minnesota*, Docket No. P-999/CI-85-582 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER AND ORDER INITIATING SUMMARY INVESTIGATIONS (November 2, 1987) (*IntraLATA Toll Access Order*).

[3] *IntraLATA Toll Access Order* at 15-16 (selecting tariffs over contractual arrangements).

[4] Pub.L.No. 104-104, 110 Stat. 56, codified in various sections of Title 47, United States Code.

[5] 47 U.S.C. § 251(a)(1).

[6] 47 U.S.C. § 251(c).

[7] 47 U.S.C. § 251(b)(5).

[8] 47 U.S.C. § 251(c)(1).

[9] 47 U.S.C. § 252(b).

- permit a competitor to begin using their networks immediately upon the competitor's request to enter into an agreement for such use.[10]

A reciprocal compensation arrangement sets forth the terms by which a carrier agrees to complete calls to its subscribers that originate within the same local calling area but on another carrier's network, and vice versa. Compensation may be based on the amount of traffic that each carrier terminates to the other carrier's network. Alternatively, the carriers may agree to a "bill and keep" arrangement whereby each carrier agrees to waive its right to bill the other for the use of the other carrier's network. Reciprocal compensation arrangements may displace traditional tariff arrangements.

Wireless carriers are not subject to all the obligations of an incumbent carrier,[11] including the general obligation to negotiate in good faith. Only when a wireless carrier requests interconnection and reciprocal compensation does the 1996 Act require the carrier to negotiate in good faith.[12] The Commission has approved hundreds of agreements between wireless carriers and ILECs, derived through negotiation, arbitration, and the adoption of terms approved in prior agreements.

II. CENTURYTEL's TARIFF FILING

CenturyTel proposes a new tariff charging wireless carriers $0.02447 per minute to terminate a local call to a CenturyTel landline customer or to receive a call from a CenturyTel landline customer. This tariff would apply except as otherwise provided in a Commission-approved agreement between CenturyTel and a wireless carrier. The tariff would authorize CenturyTel to discontinue service to any wireless carrier that failed to comply with the tariff.

III. PARTY POSITIONS

A. Wireless Consortium

The Wireless Consortium claims that CenturyTel's proposal is barred by federal law, arguing as follows:

- Federal law preempts state law with respect to wireless carriers.
- The 1996 Act establishes a comprehensive scheme for creating compensation mechanisms for ILECs and therefore preempts any state law compensation schemes.
- By unilaterally imposing a price on a wireless carrier, CenturyTel's proposed tariff undercuts the carrier's bargaining position and represents bad-faith bargaining.

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[10] 47 C.F.R. § 715(a).

[11] 47 U.S.C. § 153(26) (The term "local exchange carrier" does not include providers of "commercial mobile service," thereby exempting wireless carriers from LEC obligations).

[12] 47 C.F.R. § 715(a).

In addition, the Wireless Consortium claims that CenturyTel's tariff is unreasonable. It argues that CenturyTel's proposed termination rate is excessive, does not reflect CenturyTel's costs, and appears to be a kind of access charge. The effect of this unreasonably high rate is to discriminate against carriers that lack termination agreements with CenturyTel.

The Consortium complains that the tariff does not provide reciprocal compensation, in that it does not provide for CenturyTel to compensate wireless carriers when CenturyTel sends traffic over a wireless carrier's network. Additionally, the Consortium objects that the proposed tariff provides for discontinuing service to wireless carriers that violate the tariff's terms.

Finally, the Consortium argues that the tariff is unnecessary. The fact that many wireless carriers have entered into interconnection agreements with ILECs refutes CenturyTel's argument that it lacks a means to compel wireless carriers to negotiate reciprocal compensation. The Consortium defends carriers that terminate calls to CenturyTel's network without any agreement, arguing that "Many carriers maintain *de facto* bill and keep arrangements with carriers with whom traffic levels are small or balanced."[13]

B. CenturyTel

CenturyTel asks the Commission to approve its proposed tariff. What the Wireless Consortium characterizes as "*de facto* bill and keep arrangements" CenturyTel decries as a practice by which certain wireless carriers avoid paying for the use of CenturyTel's service.

CenturyTel emphasizes that its proposed tariff would not apply to any wireless carrier that had a Commission-approved agreement with CenturyTel containing contrary terms. Nor would the tariff impinge upon a carrier's right to obtain an agreement with CenturyTel; the 1996 Act guarantees that right. CenturyTel has no reluctance to enter into such agreements with wireless carriers. To the contrary, the Wireless Consortium acknowledges CenturyTel's history of entering into interconnection agreements and termination agreements with wireless carriers. Consequently, CenturyTel argues, the tariff does not conflict with or otherwise affect the operation of the 1996 Act. Rather, the tariff is designed to address only those carriers that decline to avail themselves of the 1996 Act, both its benefits and its duties.

CenturyTel disputes the claim that the 1996 Act preempts state procedures for intercarrier compensation by providing a comprehensive scheme of its own. CenturyTel argues that the 1996 Act does not provide a mechanism by which CenturyTel can compel a wireless carrier to enter into negotiations over the terms for using CenturyTel's network. Consequently, the 1996 Act's scheme is not comprehensive, and this aspect of state regulation has not been preempted.

While CenturyTel acknowledges that its proposed termination rate is higher than the termination rate in some of CenturyTel's interconnection agreements, CenturyTel argues that the cost of enforcing a termination tariff with a wireless carrier may justify the higher overhead costs.

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[13] Wireless Consortium comments at 3.

> It may very well be that a CMRS provider negotiating an Interconnection Agreement can argue that the costs of exchanging traffic with it are lower that the costs of exchanging traffic with an uncooperative CMRS provider whose traffic must be searched out, tracked down and invoiced through a general tariff provision.[14]

CenturyTel disputes the claim that its proposed tariff is discriminatory or otherwise unreasonable. Because any carrier may opt out of the tariff by simply exercising its right to enter into an interconnection agreement, CenturyTel argues that concerns about the tariff's discriminatory impact should be discounted.

C. The Department

Similar to CenturyTel, the Department concludes that the Commission has the authority to approve a tariff designed to recover termination charges from wireless carriers that are not otherwise governed by an agreement. But the Department shares many of the Wireless Consortium's concerns about the terms of the specific tariff proposed by CenturyTel.

The Department recommends that the Commission not allow CenturyTel's proposed tariff to take effect until after CenturyTel has provided additional information, and perhaps after it has revised the tariff's terms. In particular, the Department argues that CenturyTel should demonstrate that its proposed rates reflect its costs and are not otherwise unreasonably discriminatory. The Department argues that the tariff should not permit CenturyTel to unilaterally discontinue service to a carrier. The Department seeks clearer language specifying that the tariff would not apply when an interconnection agreement exists between the parties, and recommends the following: "This tariff applies unless a Commission-approved interconnection agreement exists between the CMRS provider and the Telephone Company."

In addition, the Department argues that the tariffs should provide for reciprocity and should not charge wireless carriers for calls originating on CenturyTel's network. While the Department argues that state-law tariffs are not subject to the 1996 Act's reciprocity requirement, the Department recommends that CenturyTel add to its tariff a statement to the effect that nothing in the tariff precludes CenturyTel from providing reciprocal compensation. Moreover, while CenturyTel cannot establish the rate that a wireless provider will charge for terminating CenturyTel's calls, CenturyTel could take a step in that direction. Specifically, CenturyTel's tariff could offer to credit a wireless carrier for the amount of traffic that CenturyTel terminates to that carrier's network. In this manner, the tariff could provide a kind of compensation to a wireless carrier without explicitly setting rates for the carrier.

[14] CenturyTel reply comments at 13-14.

IV. COMMISSION ACTION

A. Commission Authority to Approve Tariff

In opposing CenturyTel's proposal, the Wireless Consortium argues that the Commission is pre-empted by both federal regulation of wireless service in general, and by the 1996 Act in particular. The Commission is not persuaded.

The fact that this tariff addresses wireless carriers does not mean that the tariff is beyond the Commission's authority. The tariff does not purport to regulate the rates charged by wireless carriers; it regulates the rates charged by a telephone company, which is a matter indisputably within the Commission's jurisdiction. Minnesota Statutes § 237.07, subdivision 1, states:

> Every telephone company shall keep on file with the department a specific rate, toll, or charge for every kind of noncompetitive service and a price list for every kind of service subject to emerging competition, together with all rules and classifications used by it in the conduct of the telephone business, including limitations on liability.

This statute authorizes the type of tariff contemplated here.

The Wireless Consortium also argues that the 1996 Act included a comprehensive scheme for intercarrier compensation, thereby preempting state mechanisms. In support of this assertion, the Consortium notes many examples of termination agreements between wireless carriers and ILECs. But the Consortium never identifies the statutes or rules that would enable CenturyTel to require such agreements. The fact that many wireless carriers have chosen to cooperate in arranging mutual compensation is not proof that all carriers will do so. And if a carrier chooses not to do so, then a tariff provides an appropriate mechanism for securing compensation. As the Missouri Court of Appeals concluded in a similar case, "The tariffs reasonably fill a void in the law where the wireless companies routinely circumvent payment to the rural carriers by calculated inaction."[15]

This Commission has previously permitted wireless termination tariffs for Barnesville Municipal Telephone Company,[16] Delavan Telephone Company[17] and Lakedale Telephone Company.[18] The Commission finds that it has authority to permit CenturyTel to adopt such a tariff as well.

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[15] *Sprint Spectrum, L.P., et al., v. Missouri Public Service Commission, et al.*, 2003 WL 1960681, __ S.W.3d __ (Mo. App. W.D. 2003).

[16] Docket No. P-502/M-98-1095; tariff effective July 28, 1998.

[17] Docket No. P-51/M-98-968; tariff effective July 8, 1998.

[18] Docket No. P-413/M-98-216; tariff effective May 27, 1998.

B. Merits of Proposed Tariff

Finding that the Commission has the authority to adopt a tariff charging wireless carriers a fee for terminating local traffic on a LEC's network, the Commission must now address whether CenturyTel's proposed tariff in particular warrants approval.

1. Rate

CenturyTel proposes to charge $.02447 per minute to complete a local call from a wireless carrier to a CenturyTel customer, unless the carrier has an agreement with CenturyTel that provides for a different charge. The Department and the Wireless Consortium argue that this rate is not justified by CenturyTel's costs. The Department argues that CenturyTel's rate incorporates a disproportionate share of CenturyTel's overhead costs. The Consortium characterizes the rate as a prohibited access rate.

Overhead costs are not directly assignable to any given item and are typically allocated throughout a company's operations, often in proportion to direct cost. For example, the Commission authorizes Qwest to increase the direct cost of unbundled network elements by 10.4% to reflect overhead costs.[19]

In this case, CenturyTel says that it calculated its proposed termination charge by identifying direct costs related to this service, including "Common Overhead" costs, of $.00921 per minute. But CenturyTel then increases this amount by 166% to recover additional unspecified overhead costs, resulting in its proposed charge of $.02447 per minute. In contrast, CenturyTel acknowledges that the termination rate in many of its interconnection agreements with wireless providers is only $.018 per minute.

While the Wireless Consortium characterize CenturyTel's proposed rate as an "access" rate, the Consortium is unclear about what distinguishes an access rate from a termination rate. While access rates apply to calls between parties in different local calling areas, CenturyTel has not proposed to apply its termination tariff to such calls. In essence, the Consortium's access rate argument appears to be another way of arguing that CenturyTel's rate is excessive.

CenturyTel argues that the cost of enforcing a termination tariff with a wireless carrier may justify the higher overhead costs. But whether or not CenturyTel might be able to justify its proposed rate based on enforcement costs, CenturyTel has not done so yet. The Commission will direct CenturyTel to revise its tariff filing to provide cost-based rates, including justification for those rates.

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[19] *In the Matter of the Commission Review and Investigation of Qwest's Unbundled Network Elements Prices,* Docket No. P-421/CI-01-1375, *In the Matter of the Commission's Review and Investigation of Certain Unbundled Network Element Prices of Qwest*, Docket No. P-442, 421, 3012/M-01-1916 ORDER SETTING PRICES AND ESTABLISHING PROCEDURAL SCHEDULE (October 2, 2002), Attachment p. A-2.

2. Discrimination

As noted above, CenturyTel argues that there may be a basis for charging more to terminate calls pursuant to a tariff than pursuant to an interconnection agreement. But given the size of the disparity between these two termination rates, the Department and the Wireless Consortium express concern that CenturyTel's proposed tariff would discriminate against a wireless carrier that lacks an interconnection agreement. The Commission shares these concerns and will direct CenturyTel, in filing its revised tariff, to ensure that its proposed rates are not unreasonably discriminatory.

3. Reciprocity

The Wireless Consortium argues that CenturyTel's proposed tariff is deficient because it is not reciprocal – that it, it requires payments from wireless carriers to CenturyTel but does not provide for payments from CenturyTel to wireless providers. While the 1996 Act requires that interconnection agreements provide for reciprocal compensation, tariffs filed pursuant to Minnesota Statutes only cover the rates charged by the regulated entity.[20] Consequently, CenturyTel had no obligation to include in its tariffs the rates that wireless carriers could charge CenturyTel.

Nevertheless, nothing in the tariff precludes a wireless carrier from charging CenturyTel the same rates that CenturyTel charges the wireless carrier. To clarify this point, the Commission will direct CenturyTel to state this fact in its tariff, as recommended by the Department.

In addition, the Commission favors the Department's recommendation that CenturyTel offer to credit a wireless carrier for the amount of traffic that CenturyTel terminates to that carrier's network. The Commission will direct CenturyTel to include such a provision in its tariff or explain why this recommendation is not technically feasible.

4. Effect of Interconnection Agreement

All parties agree that CenturyTel's proposed tariff should not apply to a wireless carrier where CenturyTel has an interconnection agreement with the carrier. The Department argues that the language of the proposed tariff could be made clearer on this point, and recommends that the Commission direct CenturyTel to clarify this language. The Commission finds this recommendation reasonable, and will direct CenturyTel to comply.

5. Discontinuance of Service

CenturyTel's proposed tariff states that CenturyTel may discontinue service to a wireless carrier if the carrier fails to comply with the tariff, including failing to pay. The Commission prohibits any carrier from disconnecting another without prior Commission approval.[21] The Department

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[20] Minn. Stat. § 237.07, subd. 1.

[21] See, for example, Docket No. P-5426/M-97-850 (August 13, 1997).

recommends that the Commission direct CenturyTel to conform its tariff to this policy. The Commission finds the Department's recommendation reasonable and will direct CenturyTel to comply.

6. Traffic Originating from CenturyTel Customers

Most of CenturyTel's tariff pertains to charges for completing calls to CenturyTel's customers originated by wireless customers. But the proposed tariff's Section F ("Land to Mobile Transmitting") would impose a charge on wireless carriers for the privilege of completing calls originated by CenturyTel's customers. This language violates longstanding convention and FCC rules.[22] The Department recommends that this part of the tariff be deleted. The Commission finds this recommendation reasonable and will direct CenturyTel to comply.

The Commission will so order.

ORDER

1. CenturyTel shall promptly submit a revised filing that contains the following features:

   - cost-based rates;
   - a rate that is not otherwise discriminatory;
   - a statement that the tariff does not eliminate reciprocity for termination rates;
   - a provision for offsetting the amount of traffic that a wireless carrier terminates on CenturyTel's network by the amount of traffic that CenturyTel terminates to the wireless carrier's network, if technically feasible;
   - language clarifying that the tariff does not apply when an interconnection agreement exists between the parties, such as "This tariff applies unless a Commission-approved interconnection agreement exists between the CMRS provider and the Telephone Company";
   - language to the effect that termination of service shall not occur without prior Commission approval; and
   - deletion of Section F (Land to Mobile Transmitting).

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[22] 47 C.F.R. § 51.703(b).

2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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